90-1525

Supreme Court, U.S.
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No. 90-1407

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAC-TEC, INC.,
Cross-Petitioner,

vs.

OWEN E. PERRY,
Cross-Respondent/Petitioner,

and

AMERACE CORPORATION,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether Due Process requires that a party be provided notice and an opportunity:

(A) to show cause why the party should not be held jointly and severally liable with its attorney prior to the imposition of sanctions of $134,000.18 under Rule 38, F.R. App. P.;

(B) to present evidence that the party properly relied on its attorney for an ethical and competent representation; and

(C) to obtain independent counsel to represent it when the party is held jointly and severally liable for sanctions with its attorney?

2. Whether an attorney who has been subjected to sanctions under Appellate Rule 38 can be relieved from the sanctions without also relieving the client who is jointly and severally liable?

3. Would the client's mere expectation of prevailing on appeal subject it to joint and several liability for sanctions arising out of the unauthorized conduct of the attorney which is sanctionable under FRAP Rule 38?

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Cross-Petitioner, Pac-Tec, Inc. ("Pac-Tec"), respectfully prays pursuant to Rule 12.3 of R. Sup Ct that a cross writ of certiorari issue in the event that a writ of certiorari be issued in response to the Petition For Writ of Certiorari No. 90-1407 ("Petition") of Owen E. Perry to review questions raised in the Opinion of the United States Court of Appeals for the Federal Circuit rendered in *Pac-Tec, Inc. v. Amerace Corporation* on May 9, 1990, and the Orders entered in the United States Court of Appeals for the Federal Circuit in *Pac-Tec v. Amerace* on January 14, 1991, and *In Re Owen E. Perry* on November 1, 1990 and December 19, 1990.

PARTIES

The Cross-Petitioner is Pac-Tec, Inc., Appellant in *Pac-Tec, Inc. v. Amerace Corporation,* Fed. Cir. Appeal Nos. 89-1329, -1692. The Cross-Respondent/Petitioner is Owen E. Perry, counsel for Pac-Tec in *Pac-Tec, Inc. v. Amerace Corporation* and party to *In Re Owen E. Perry,* Fed. Cir. Misc. No. 289. The Cross-Respondent is Amerace Corporation (now known as Stimsonite Corporation), and the defendant/appellee in *Pac-Tec, Inc. v. Amerace Corporation.*

OPINIONS BELOW*

The opinion of the United States Court of Appeals for the Federal Circuit in *Pac-Tec v. Amerace* dated May 9, 1990 is reported at 903 F2d 796. The slip opinion is reproduced in Appendix A to the Petition beginning at page A1. The opinion as

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* References to material in the Appendices to the Petition For Writ of Certiorari 90-1407 filed by Owen Perry will be cited by Appendix letter and page as App. - A ;

References to material in the Appendices of this Cross Petition For Writ of Certiorari will be cited by Cross Appendix letter and page as Cr App - A .

lished in the Federal Reporter is reproduced in Appendix C to Petition beginning at page A16. The order of the United States Court of Appeals for the Federal Circuit entered on November 1, 1990 is reported at 918 F2d 931 and is reproduced in Appendix D to the Petition beginning at page A30. The orders of the United States Court of Appeals for the Federal Circuit entered on December 19, 1990 in *In Re Perry* and January 14, 1991 in *Pac-Tec v. Amerace* are not reported and are, respectively, reproduced in Appendix E and F of the Petition beginning at pages A39 and A40.

JURISDICTION

The order of the Court of Appeals (entered in *In Re Perry*) denying Perry's motion to intervene in *Pac-Tec v. Amerace* was entered on November 1, 1990 (App. D-A30-38). The order of the Court of Appeals finally resolving the issues raised as to Perry in its May 9, 1990 opinion in *Pac-Tec v. Amerace* was entered on January 14, 1991 (App. E-A40).

Perry filed an application to extend time to file a petition for writ of certiorari on January 19, 1991 (File No., A-558). The application was granted in an order dated January 23, 1991 extending the time for filing a petition for writ of certiorari to March 1, 1991.

The petition was received by counsel for Pac-Tec on March 4, 1991, thus the date for filing a cross petition under Rule 12.3 of the R. Sup Ct is April 3, 1991.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND FEDERAL RULES PROVISIONS INVOLVED

The constitutional, statutory and federal rules provisions involved in this case are: the Fifth Amendment to the United

States Constitution, 28 U.S.C. §2072, 28 USC §1927, and Fed. R. App. P. 38 and 46(c), are set forth as follows:

U.S. CONST. amend V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

28 U.S.C. §1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct.

28 U.S.C. §2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts, (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Federal Rules Involved

Rule 38, Federal Rule of Appellate Procedure, Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Rule 46, Federal Rules of Appellate Procedure, Attorneys

(c) Disciplinary Power of the Court over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

STATEMENT OF FEDERAL JURISDICTION IN THE FIRST INSTANCE

Jurisdiction in the United States District Court for the Eastern District of Michigan in the first instance was based upon 28 U.S.C. §§1331, 1332, 1338, 2201 and 2202.

STATEMENT OF THE CASE

Cross-Petitioner, Pac-Tec, is appellant in *Pac-Tec, Inc. v. Amerace Corp.*, which is in the Court of Appeals for the Federal Circuit. The Federal Circuit found Pac-Tec jointly and severally liable with its counsel, Owen E. Perry, for sanctions in the amount of $134,000.18 under Rule 38 of the Federal Rules of Appellate Procedure. Perry was subsequently terminated as counsel for Pac-Tec, however, he has lodged a petition for certiorari seeking review of the procedure under which he was sanctioned by the Federal Circuit. Pac-Tec lodges this cross petition to raise questions relating to whether Pac-Tec should be sanctioned for its counsel's conduct and whether the procedures followed by the Federal Circuit were proper with respect to Pac-Tec.

The Federal Circuit imposed sanctions against both Pac-Tec and Perry for maintaining a frivolous appeal. However, it was Perry's conduct in handling the appeal which caused the award of sanctions. The Federal Circuit characterized Perry's conduct during the appeal by stating ". . . Pac-Tec's counsel displays a deplorable depth of disrespect for the judicial process and a lamentable lack of candor in misstating the record and in disregarding the rules of procedure in the decided cases".[1]

For over twenty years, Perry represented Pac-Tec and its predecessors in intellectual property matters.[2] Over the years, Pac-Tec and its predecessor entities relied on Perry for his counsel. That counsel included an opinion that the patents-in-suit were invalid and recommended filing the Declaratory Judgment which was the subject of the appeal to the Federal Circuit.[3] Unfortunately, Owen Perry and Pac-Tec were unsuccessful in establishing the invalidity of the patent at trial. However, Perry steadfastly maintained that his position with respect to the invalidity of the patent was legally justified and that he would certainly succeed in obtaining a reversal by the Federal Circuit.[4]

Based on Mr. Perry's recommendation, an appeal of the District Court's judgment was lodged to the Federal Circuit by Perry.

On October 30, 1989, during the pendancy of the appeal, the Federal Circuit issued an Opinion denying a petition for a Writ of Mandamus which Perry had filed and awarded sanctions. The Federal Circuit found that the record had been misstated and that Perry had made an unfounded attack on remarks of the District Court.[5]

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[1] App. C - A21

[2] App. I - A46

[3] App. I - A46

[4] App. I - A46

[5] Cr. App. A - A1. On January 14, 1991, the Federal Circuit imposed sanctions in the amount of $16,600.00; Cr. App. B - A3.

On December 8th, 1989, the Court of Appeals for the Sixth Circuit denied the petition for mandamus filed by Perry on Pac-Tec's behalf. This petition sought a writ directing the trial judge to vacate his denial of a recusal motion. The Sixth Circuit also sanctioned Pac-Tec by awarding Amerace its attorney fees and double costs under Rule 38.[6]

Perry continued to soothe Pac-Tec by asserting that that patent was invalid and that he and Pac-Tec would obtain a reversal in the appeal before the Federal Circuit. On January 15, 1990, Perry reported to Pac-Tec's auditors that "our evaluation is that the likelihood of an unfavorable outcome to Pac-Tec from the Federal Circuit appeal is very low. In fact, we have advised management that the probability that this judgment will be reversed on appeal is as high as in any case we have seen. The District Court judgment is in clear conflict with the controlling decisions of the Federal Circuit, therefore, the Federal Circuit can affirm the District Court's judgment in Amerace's favor only by ignoring its own prior decisions."[7]

After the filing of the briefs in the appeal, Pac-Tec was concerned as to whether Perry's optimistic expectation of success were accurate. Pac-Tec's general counsel sought an independent review of the briefs after they been submitted to the Federal Circuit. Pac-Tec's general counsel sought to evaluate whether Pac-Tec should attempt to negotiate a settlement with the appellee or abandon the appeal.

Contrary to the assertions of Perry in his Declaration,[8] which was relied on in the petition for certiorari,[9] the independent counsel deemed that Perry had "not made sufficient showing of

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[6] Cr. App. C - 4. The Sixth Circuit later imposed an award of $28,764.00 against Pac-Tec.

[7] Cr App. E - A8

[8] App. I - A49

[9] Petition For Writ Of Certiorari To The United States Court of Appeals for the Federal Circuit. No. 90-1407 p. 4.

error to obtain a reversal".[10] Unfortunately, the appeal had proceeded to a point beyond which a settlement could be negotiated. Furthermore, Perry overcame any misgivings Pac-Tec may have had and Pac-Tec was persuaded by Perry not to withdraw the appeal.

On May 9, 1990, the Federal Circuit issued its Opinion denying the Pac-Tec appeal and found Pac-Tec and its counsel, Owen E. Perry, jointly and severally liable for sanctions pursuant to Appellate Rule 38.[11] The opinion chastised Perry for doctoring and distorting testimony;[12] making false arguments;[13] egregiously flouting the law in presenting his arguments;[14] and making arguments which were "baseless".[15] In characterizing Perry's conduct during the appeal, the Federal Circuit stated that "Pac-Tec's counsel displays a deplorable depth of disrespect for the judicial process and a lamentable lack of candor in misstating the record and in disregarding the rules of procedure in the decided cases."[16] Finally, the Federal Circuit characterized Perry's actions as being ". . . an outrageous fabrication".[17]

The Federal Circuit Opinion made no finding that Pac-Tec was in any way guilty of wrongful conduct with respect to the appeal. The Federal Circuit imposed liability on Pac-Tec jointly and severally with Perry only because Pac-Tec ". . . stood to benefit if counsel's deplorable tactics had succeeded".[18]

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[10] App. I - A49

[11] App. A - A1-14

[12] App. A - A7

[13] App. A - A9

[14] App. A - A14

[15] App. A - A6

[16] App. A - A6

[17] App. A - 14

[18] App. A - 14

On receipt of the Federal Circuit Opinion on May 9, 1990, the Board of Directors of Pac-Tec promptly met and terminated Perry and his firm from further representation of Pac-Tec.[19] But the damage had been done. Pac-Tec had relied on Perry for a proper and ethical representation. Pac-Tec was shocked to find that not only had its lost its appeal, but that it was further subjected to sanctions in the form of liability for Amerace's attorney's fees and double costs, which was later assessed in the amount of $134,000.18[20] because of the manner in which Perry had conducted the appeal.

As is evidenced from the record of the trial court proceedings and from the Federal Circuit record, Pac-Tec has been led and seduced into a litigation process which no conscionable and competent attorney would have undertaken. As a result of the various sanctions and awards which have been made during this litigation, Pac-Tec is now struggling for its existence.

REASONS FOR GRANTING THE WRIT

This writ should be granted because there exist serious questions of due process as well as conflicts in the application of Rule 38 among various circuits. These questions are of great importance to clients who are subject to such sanctions and to the members of the bar.

I. WHEN SANCTIONS ARE AWARDED BECAUSE OF AN ATTORNEY'S CONDUCT IN HANDLING LITIGATION, THE ATTORNEY SHOULD BE HELD RESPONSIBLE FOR THE SANCTIONS

There can be no doubt that the Federal Circuit deemed Pac-Tec's appeal frivolous because the Court was appalled and offended by the conduct of Perry in maintaining the appeal. The Federal Circuit stated:

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[19] App. H - A44-45

[20] App. A - A40

> "the appeal itself is frivolous, and its frivolity is unrelieved by even one of counsel's many arguments. Beyond frivolity, however, the conduct of counsel in this litigation infects the judicial process with a disabling disease of deceit that the Courts must act to expunge, for if the Courts remain passive, that disease will spread until it destroys the judicial process in a legal profession no longer worth preserving."[21]

Throughout its opinion, the Federal Circuit frequently cites Perry for misleading the Court, for making false statements in its brief,[22] characterizes some of Perry's allegations as "outrageous fabrication",[23] and finds that Perry ". . . egregiously flaunts the law in presenting his argument to this Court".[24] Nevertheless, the Federal Circuit found that Pac-Tec should be jointly and severally liable with Perry because Pac-Tec ". . . stood to benefit if counsel's deplorable tactics had succeeded".[25]

There has been no showing that Pac-Tec caused or directed any of the conduct which resulted in the award of sanctions. Pac-Tec relied on its counsel, Perry, by whom it had been represented for over twenty years. There had never been any prior indication that Perry would resort to such "egregious conduct". Moreover, Perry had represented to Pac-Tec and its accountants that this case had the best chance of success of any case it had ever seen.[26]

The Federal Circuit is of the opinion that Pac-Tec should be sanctioned because it stood to gain from counsel's deplorable tactics. However, the likelihood of success when an attorney uses "deplorable tactics" is so low that the possible gain that a client

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[21] App. A - A6

[22] App. A - A9

[23] App. A - A14

[24] App. A - A14

[25] App. A - A14

[26] Cr App. F - A11

might obtain should not be viewed as a factor in such a determination. Rather, as recognized by Elson and Rothschild:

> "It is the client, however, who is the principal victim of incompetence, and the remedies afforded by Rule 11 do nothing for the client."[27]

Sanctions such as those made under Rule 11 of the Federal Rules of Civil Procedure or Appellate Rule 38 are generally made for the purposes of compensation of opposing party, punishment for wasting judicial resources, and deterance against like conduct in the future.[28] None of these goals are served by imposing sanctions on a client. The client is entitled to have its counsel abide by the code of professional responsibility which states: "competent representation requires the legal knowledge, skill, thoroughness of preparation reasonably necessary for the representation."[29] The client expects his attorney, even if losing, to present its case to the Court with dignity and integrity.

It is the attorney who can best assess the needs of the client. The attorney alone can determine if the client is properly seeking judicial relief; whether the client's cause can be presented honestly; and if it is founded on substantive law and facts having probative value. It is the attorney that possess the skill, knowledge and integrity to advise the client of whether an appeal should be undertaken. A good shephard will not lead his sheep astray and if the sheep are lost, it is the shephard who must pay.

If similar actions are to be deterred in the future, it is the members of the bar that must recognize what conduct will be sanctionable and must either take or refrain from such conduct in order to avoid foisting such improper conduct upon the court system and opposing parties. The deterrent effect of the imposi-

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[27] Elson & Rothschild, *Rule 11: Objectivity and Competence,* 123 FRD 361 (1989)

[28] Mar.ineau & Davidson, *Frivolous Appeals: The Uncertain Response,* 1984 Duke L. Jour. 845

[29] ABA Model Rules of Professional Conduct, Rule 1.1.

tion of sanctions clearly has a much greater value when levied solely against counsel. Thus, there is no reason for penalizing a client for the conduct of his counsel. The client is a loser. The client has not received a proper representation. In a case where counsel's conduct is deceitful or dilatory, the client is exposed to a great risk of losing on the merits even if there are proper grounds for appeal.

When an award of sanctions is made because of an attorney's conduct, such sanctions should be imposed on the attorney, not on the client. This principle has been recognized in a number of proceedings. In *Schneider v. American Export Lines, Inc.*, 293 F Supp 117 (SDNY 1968), the District Court for the Southern District of New York awarded sanctions solely against plaintiff's counsel. The District Court noted that "[c]learly plaintiff was not at fault here.", 293 F. Supp at 118. The District Court had previously dismissed the case because of a failure to prosecute. After a hearing, the Court found that it was plaintiff's counsel which failed to prosecute, and the District Court imposed sanctions solely against plaintiff's counsel. Although this case applies to Rule 11 sanctions, the principle should be extended to Rule 38.

Likewise, the Federal Circuit has imposed sanctions solely against a party's counsel under Rule 38 of the Federal Rules of Appellate Procedure. In *Sun-Tek Industries, Inc. v. Kennedy Sky-Lites, Inc.*, 9 USPQ 2d 1974 (CAFC 1989), the Court found that the appeal was frivolous. The appeal was brought to challenge a finding that counsel had not complied with an earlier order. The Federal Circuit imposed sanctions solely against counsel.

In *PaineWebber, Inc. v. Can Am Financial Group, Ltd.*, 121 FRD 324 (N.D. Ill, 1988), the District Court imposed Rule 11 sanctions on an attorney for failing to file a required appearance form, for misrepresentation to the Court that the appearance form had been filed and for filing a motion to vacate which was signed by a corporate officer rather than the attorney. The District Court found that the attorney was primarily responsible for the Rule 11 violation and imposed sanctions solely on the attorney to have a

deterrent effect on the attorney, 121 FRD at 337. The Court also found a corporate defendant liable jointly and severally with its attorney for a separate sanction because of the deception of the client.

It is clear that the imposition of sanctions under Rule 38 in the Court below was made because of the conduct of Perry. The Federal Circuit made Pac-Tec jointly and severally liable with Perry because "it stood to gain if Perry's deplorable tactics had succeeded". The superficial logic of this statement is inappropriate because Pac-Tec did not seek or endorse such conduct. Pac-Tec assumed that its counsel would represent its interest properly. There is absolutely no evidence that Pac-Tec sought, condoned, or knew of the potential for counsel's wrongful conduct. However, the procedure followed by the Federal Circuit foreclosed Pac-Tec from presenting evidence on why it should not be sanctioned.

Because of the Federal Circuit's opinion, Pac-Tec lost its appeal and, is thus, subjected to liability in the trial court. Additionally, Pac-Tec has been subjected to liability for sanctions as a result of the petition for Writ of Mandamus brought in the Federal Circuit. It is clear that those sanctions were levied because of Perry's improper procedure and misstatements to the Court. Pac-Tec was not afforded notice or opportunity to be heard, because Perry was counsel for Pac-Tec at the time when the Court determined that sanctions should be imposed on Pac-Tec. Perry did not advise Pac-Tec that action should be taken to have the sanctions imposed on the culpable person - Perry. The apparent conflict of interest in such circumstance is obvious. It would be unrealistic to expect Perry to advise Pac-Tec that it should be separately represented on this question or to take responsibility for the sanctions.

Additionally, Pac-Tec has been forced to bear its own attorney's fees, as well as having been sanctioned in the amount of $134.000.18. Pac-Tec has lost greatly as a result of its counsel's actions. Further, it must resort to additional litigation to obtain redress. Thus, it is submitted that when an attorney's conduct

results in the imposition of an award of sanctions under Rule 38 or Rule 11 that the Court should take action to imposed the fees on the person responsible for the sanctions. The objectives of Rules 11 and 38 are not obtained by permitting sanctions to be assessed against a client who has relied on the competence of its attorney. Absent appropriate notice and opportunity to be heard, Pac-Tec was unable to address the conflict issues and to exclupate itself from sanctions.

II. DUE PROCESS REQUIRES A NOTICE AND A HEARING BEFORE THE IMPOSITION OF SANCTIONS

Pac-Tec became aware for the first time of the Federal Circuit's view of its appeal and its counsel's conduct in the maintenance of the appeal when it received the Federal Circuit's Opinion dated May 9, 1990. However, Pac-Tec found itself liable for sanctions without notice or an opportunity to be heard. Pac-Tec immediately discharged Perry and sought new counsel. But upon a review of the Federal Circuit's opinion it was clear that the Court had exhausted all patience with Pac-Tec's "singularly sanctionable sojourn among the hallowed halls of justice"[30] and it would be ill disposed to any application for reconsideration. Nothing in the record, however, supported the sanctions which were imposed against Pac-Tec.

If the Federal Circuit had been required to provide notice and a hearing before the imposition of sanctions, Pac-Tec would have had an opportunity to present evidence that it was in no way responsible for the sanctionable conduct. Pac-Tec would not have feared the further wrath of the Federal Circuit for attempting to show its lack of culpability. However, without a rule which requires notice and an opportunity to show cause why sanctions should not issue, a party finds its ability to protest severely chilled. Such a situation is aggravated in the case where, as here, a party's counsel acts outside the bounds of proper conduct. Although an

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[30] App. A - A6

appellant's counsel may be on notice that sanctions may result when an appellee characterizes an appeal as frivolous, a client has no notice unless his attorney advises him accordingly. It would be extraordinary to find an attorney who would inform his client that an appeal is frivolous and will result in sanctions.

As set forth in Perry's Petition for Certiorari, the procedure followed by the Federal Circuit denied due process of law both to Perry and to Pac-Tec. Pac-Tec hereby incorporates by reference[31] the arguments made in Perry's Petition for a Writ of Certiorari as they relate to the standards of due process which should be applied to such situations.

In discussing the proper standards for due process in situations involving sanctions, this Court has stated that "like other sanctions, attorney's fees certainly should not be assessed . . . without fair notice and opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper,* 447 US 752, 767, 100 S. Ct. 2455, 2464 (1980). Such a hearing is particularly necessary as in the present situation where a client is being sanctioned for the conduct of his attorney.

The procedures for due process which were adopted in *Roadway* related to violations of 28 USC §1927. Although this section relates to an imposition of sanctions on an attorney, the same standards should be available to a client who is sanctioned. It is necessary to follow the procedures established in *Roadway* in all cases where sanctions are imposed. Such a procedure requires notice and a hearing. During a hearing, the Court should determine whether liability should be imposed solely against a client or an attorney or whether they should be jointly liable for such sanctions. Before any finding against the client based on condemnation the client should have been afforded the opportunity to be heard and the opportunity to have been represented by counsel.

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[31] Petition For Writ of Certiorari To The United States Court of Appeals No 90-1407 p.19

Due process requires clear standards of culpability for sanctions. As set forth in Perry's petition, the standards for "frivolous appeals" are unconstitutionally vague. Pac-Tec agrees with and incorporates Perry's arguments by reference.[32]

III. ATTORNEY PERRY SHOULD NOT BE EXCULPATED FROM LIABILITY FOR SANCTIONS LEVIED AS A RESULT OF HIS CONDUCT WITHOUT ALSO EXCULPATING PAC-TEC

The petition for Writ of Certiorari filed on behalf of attorney Perry is made solely on Perry's behalf. Perry does not seek relief for his former client, Pac-Tec, with whom Perry is jointly and severally liable. Perry does not in any way address the plight of his former client. If this Court grants Perry's petition and requires the Federal Circuit to revisit the sanctions levied on Perry, it is imperative that such relief also be extended to Pac-Tec. Otherwise, the Court has caused an inexplicable unapplicable anomaly, whereby it holds that Pac-Tec instituted a frivolous appeal but its counsel did not. Since Perry's petition is framed solely to provide relief to Perry it is possible that Perry could be exculpated from liability from these sanctions and that Pac-Tec would remain liable. Such a result would be patently improper and illogical in view of the basis for imposing the sanctions. The sanctions were imposed because of Perry's misconduct in maintenance of the appeal. Thus, any review of the procedure relating to the levy of sanctions by this Court must include review of the basis for Pac-Tec's liability.

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[32]Petition For Writ of Certiorari To The United States Court of Appeals For The Federal Circuit p.8

CONCLUSION

For these reasons, the Cross-Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1329,-1692

IN RE PAC-TEC, INC.,
Plaintiff-Appellant,

OWEN E. PERRY,
Appellant,

v.

AMERACE CORPORATION,
Defendant-Appellee.

MISCELLANEOUS DOCKET NO. 260

IN RE PAC-TEC, INC.,
Petitioner.

ON MOTION

Before MARKEY, *Chief Judge,* FRIEDMAN and BISSELL, *Circuit Judges.* FRIEDMAN, *Circuit Judge.*

O R D E R

Pac-Tec, Inc. filed a document labelled "Writ of Mandamus," misc. no. 260, requesting relief from the injunctive portion of a February 14, 1989 district court judgment. Pac-Tec has an appeal pending from that judgment, appeal nos. 89-1329,-1692. Accordingly, we are treating Pac-Tec's "writ" as a motion for a

stay pending appeal.* Amerace Corporation opposes the motion for stay and moves for costs and fees under Fed. R. App. P. 38. Pac-Tec replies to Amerace's opposition. Amerace submits a supplemental exhibit.

Pursuant to Fed. R. App. P. 8(a), a stay must ordinarily be sought in the first instance in the district court. In this case, no stay was sought. Pac-Tec's argument that its motion to amend filed in the district court satisfies the Rule 8(a) requirement is without merit. Further, Pac-Tec concedes that many of the issues presented in its motion here were not presented to nor considered by the district court. Finally, Pac-Tec misstates the record and directs an unfounded attack on certain remarks of the district court.

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* A court of appeals has no occasion to engage in extraordinary review by mandamus when it can exercise the same review by a contemporaneous, ordinary appeal. *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 8 n.6 (1985). Here, there was absolutely no basis for Pac-Tec's filing of a "writ" where the very order complained about is presently on appeal.

In view of the foregoing and after review of the papers submitted, we determine that Pac-Tec's motion is frivolous and that attorney fees and double costs will be awarded to Amerace.

Accordingly,

IT IS ORDERED THAT:

(1) Pac-Tec's motion for a stay is denied.

(2) Amerace's motion for sanctions is granted. Attorney fees and double costs are awarded to Amerace to cover its opposition to the "Writ of Mandamus."

FOR THE COURT

(s) DANIEL M. FRIEDMAN
Circuit Judge

Date Oct 30 1989

cc: Ronald A. Sandler, Esq.
Owen E. Perry, Esq.

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
OCT 30 1989
FRANCIS X. GINDHART
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Miscellaneous No. 260

IN RE PAC-TEC, INC.,
Petitioner

89-1329,-1692

PAC-TEC, INC.,
Plaintiff-Appellant,

v.

AMERACE CORPORATION,
Defendant-Appellee.

Owen E. Perry, of Reising, Ethington, Barnard, Perry & Milton, Troy, Michigan, argued for plaintiff-appellant. With him on the brief were *Jeanne-Marie Buiteweg* and *Richard W. Hoffman. Thomas E. Anderson,* Gifford, Groh, Sprinkle, Patmore & Anderson, P.C., of Birmingham, Michigan, represented plaintiff-appellant.

Ronald A. Sandler, of Jones, Day, Reavis & Pogue, Chicago, Illinois, argued for defendant-appellee. With him on the brief was *Sandra B. Weiss.* Of counsel were *Charles Rutherford, Robert L. Kelly* and *Dykema Gossett,* of Detroit, Michigan.

Appealed from: United States District Court for the Eastern District of Michigan

Judge DeMascio

ORDER

Before MARKEY, *Circuit Judge,* BENNETT, *Senior Circuit Judge,* and PLAGER, *Circuit Judge.*

On consideration of Amerace's application for the attorney fees and costs awarded in this court's order of October 30, 1989 and the opposition thereto filed by Pac-Tec, the surviving members of the panel in No. 260 having referred the matter to this panel for disposition simultaneously with Amerace's application for attorney fees and costs in the appeal,

IT IS ORDERED that Amerace is entitled to recover from Pac-Tec, within 30 days of the date of this ORDER, the sum of $16,600.20 as attorney fees and costs under the order of October 30, 1989.

14 Jan 91
Date

FOR THE COURT
(s) Howard T. Markey

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
JAN 14 1991

FRANCIS X. GINDHART
CLERK

APPENDIX C

No. 89-2225

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Pac-Tec, Inc.,	)	
	)	
Petitioner.	)	**ORDER**
	)	
	)	

Before: MILBURN and BOGGS, Circuit Judges; and ENGEL, Senior Circuit Judge.

On October 30, 1989, Pac-Tec, Inc., plaintiff in the underlying action, petitioned for a writ of mandamus requesting, *inter alia*, recusal of the district judge. The defendant, Amerace Corporation, submitted a motion and a brief in opposition to Pac-Tec's petition. On December 8, 1989, we denied the petition as frivolous, and assessed double costs and attorney's fees against Pac-Tec.

Pursuant to this assessment, Amerace submitted an application for double costs and attorney's fees in the amount of $27,536, of which $25,340 were for attorney's fees. After it discovered an error in its calculations, Amerace subsequently submitted a revised application for double costs and attorney's fees in the amount of $28,764, of which $26,568 were for attorney's fees.

Pac-Tec opposed Amerace's original bill on a number of grounds, including that the cost of a trip allegedly related to the litigation was excessive, that the billing rate of one of Amerace's lawyers was excessive, and that Amerace's counsel's internal records (which were submitted in support of Amerace's bill) did not reflect the amount actually billed to Amerace. We consider these arguments in relation to the revised bill as well.

After the denial of its petition, Pac-Tec also moved to strike Amerace's submission of the motion and the brief in opposition to the petition, contending that a respondent to a petition, such as

Amerace, may file a response only at the direction of the court. Pac-Tec contends that this court did not so direct Amerace.

We find Pac-Tec's arguments concerning the size of Amerace's bill to be unpersuasive, and deny its motion in opposition to Amerace's application. We thus impose double costs and attorney's fees against Pac-Tec in the amount of $28,764. As to the propriety of Amerace's response to Pac-Tec's petition, we note that the law in this circuit is not well-established as to whether such responses may be filed without direction of the court. However, we also note that the substance of Amerace's response was helpful in our decision as to the merits of Pac-Tec's petition.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Gesu
Clerk

APPENDIX D

March 5, 1990
Our File: AH0-100/1

Mr. Haig Avedisian, Esq.
401 S. Woodward, Ste. 450
Birmingham, MI 48009

Re: PAC-TEC, INC. v. AMERACE CORP.

Dear Mr. Avedisian:

Enclosed herewith please find the briefs for the Appeal in Pac-Tec, Inc. v. Amerace Corp. As I previously indicated, we have reviewed the briefs of the parties in this Appeal.

Appellant's chief argument is that the claims of the patents in suit do not distinguish the Patentee's invention from the prior art. This argument is based on the premise that the limitations contained in the claims which differentiate the invention are functional limitations rather than structural limitations. This is a correct statement of the law, however, Appellant must establish that the Judge was wrong as a matter of law in ruling that the limitations were structural rather than functional. It should be noted that the Patent Office, in issuing the patent, found that the claims properly distinguished the patent over the prior art.

Appellant's argument is a technical legal argument which stems from the time when patents were looked upon with disfavor by the Court. However, with the advent of the Court of Appeals for the Federal Circuit, technical legal arguments, such as these, have been relatively unsuccessful.

The Appellant raises several other arguments with respect to "obvious-type double patenting", exclusion of certain evidence, and judicial bias. It is unlikely that these factors will be sufficient to obtain reversal. With respect to double patenting, this issue was decided in the Court's ruling on the Motion for Summary Judgment. The Appellant fails to point to any issues of material fact which were contested at the time of the Motion for Summary

Judgment or errors of law which would result in reversal. With respect to the excluded evidence, the Couirt's action appears to be proper under 35 USC §282. This rule was enacted for the purpose of preventing surprise or late introduction of evidence prior to or at trial. Appellant has failed to demonstrate that it is entitled to an exception to the rule.

The standards for obtaining a reversal on appeal are stringent. Additionally, the Court of Appeals for the Federal Circuit has proven to be a "pro-patent" Court. Thus, in order to sustain an appeal, the Appellant must make a strong showing of error by the Trial Court. In our view, the Appellant has not made sufficient showing of error to obtain a reversal.

Very truly yours,

Thomas E. Anderson

APPENDIX E

January 15, 1990

VIA FACSIMILE

Ernst & Young
2400 Nationwide Plaza
Columbus, Ohio 43215

Re: *Pac-Tec, Inc.*

Gentlemen:

This is in connection with your examination of the financial statements of Pac-Tec, Inc., pursuant to the request in the November 3, 1989 letter to us from Pac-Tec (copy enclosed).

We present Pac-Tec in the following litigation:

Pac-Tec, Inc. v. International Packaging, Inc.,
Civil Action No. 84 CV 0545 DT,
United States District Court,
Eastern District of Michigan

Pac-Tec, Inc. v. Arpak
Civil Action No. 86 CV 926
United States District Court,
Northern District of New York

Pac-Tec, Inc. v. Amerace
Civil Action No. 86 CV 73873 DT
United States District Court,
Eastern District of Michigan

There has been no change in the Pac-Tec v. Inventive Packaging litigation since our December 21, 1988 letter (copy enclosed). It is our understanding that Inventive Packaging is still involved in proceedings in the Bankruptcy Court, and has not yet resumed operation. In view of the financial condition of Inventive Packaging, the chances of Pac-Tec obtaining any recovery from Inventive Packaging is practically nil.

There has been no change in the Pac-Tec v. Arpak litigation since our December 21, 1988 letter (copy enclosed). We doubt that there is any significant likelihood that Pac-Tec will recover anything from Arpak because of Arpak's financial condition.

Pac-Tec received an adverse decision from the District Court in Pac-Tec v. Amerace. The District Court ruled on January 27, 1989 that Pac-Tec infringed the Amerace patents, and that the Amerace patents are valid. That judgment is now on appeal to the United States Court of Appeals for the Federal Circuit in Washington, D.C. All of the briefs have been filed and we expect the Court to set the appeal for a hearing in March or April. The Federal Circuit renders a decision within three months of the date of the hearing in the overwhelming majority of its cases.

Our evaluation is that the likelihood of an unfavorable outcome to Pac-Tec from the Federal Circuit appeal is very low. In fact, we have advised management that the probability that this judgment will be reversed on appeal is as high as in any case we have seen. The District Court judgment is in clear conflict with controlling decisions of the Federal Circuit; therefore, the Federal Circuit can affirm the District Court judgment in Amerace's favor only by ignoring its own prior decisions.

Following the January 27, 1989 judgment under appeal, the District Court instituted proceedings to determine if any damages would be assessed against Pac-Tec, and if Pac-Tec would be required to pay Amerace its costs and attorney fees. No damages were assessed because Pac-Tec has made no sales. However, in an Order dated September 25, 1989, the District Court ruled in favor of Amerace on the attorney fees issue and ordered Amerace to submit an itemization of the amount of attorney fees. A motion has been filed by us in the District Court requesting it to reconsider its award of attorney fees to Amerace. The District Court has not yet ruled on that motion.

We believe that it is clear error for the Court to award attorney fees to Amerace under the circumstances of this case, and that the chances of an attorney fee award being upheld on

appeal is practically nil, even in the unlikely event of an adverse decision against Pac-Tec on the appeal from the January 27, 1989 Judgment presently pending in the Federal Circuit.

The District Court has yet to rule on our motion for reconsideration of the award of attorney fees, and has yet to determine the amount of attorney fees. Amerace requested an award in the amount of $871,252 in fees and costs. We have challenged the amount in its entirety. It is difficult to predict how the District Court will rule on the amount of attorney fees. There is at least some possibility that the District Court will defer ruling on the attorney fee issue until the Court of Appeals rules on the presently pending appeal from the January judgment. That is the most optimistic outcome for the attorney fee issue presently pending in the District Court. In any event, if the District Court denies our motion to reconsider the award of attorney fees, and does order Pac-Tec to pay attorney fees in any amount to Amerace, our evaluation that the likelihood of any such decision being upheld on appeal is practically nil. In our opinion, it would be unprecedented for the Federal Circuit to uphold a District Court decision ordering Pac-Tec to pay attorney fees to Amerace, in any amount, based on the circumstances of this case and controlling decisions of the Federal Circuit.

If the Federal Circuit rules in Pac-Tec's favor on the appeal of the January 27, 1989 Judgment, any judgment of the District Court awarding attorney fees to Amerace will be automatically nullified. Amerace will no longer be the prevailing party and attorney fees and costs can only be awarded to a prevailing party.

We are not aware of any other pending or threatened litigation, claims and assessments.

We are not aware of any unasserted claims that are probably of assertion and that should be disclosed in accordance with Statement of Financial Accounting Standards No. 5.

We confirm the understanding stated in paragraph 4 of the enclosed letter as to the applicable requirements of Statement of Financial Accounting Standards No. 5.

Please advise us promptly if you need any additional information from us.

Very truly yours,

REISING, ETHINGTON, BARNARD,
PERRY & MILTON

/s/ OWEN E. PERRY

(2)

Supreme Court, U.S.
FILED
MAY 1 1991
OFFICE OF THE CLERK

No. 90-1525

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAC-TEC, INC.,
Cross Petitioner,

vs.

OWEN E. PERRY,
Cross Respondent/Petitioner,

and

AMERACE CORPORATION, *Respondent.*

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Note: The first two of the following questions are among the four questions raised in the original Petition for Certiorari, and have been incorporated by reference in the Cross-Petition.

1. Whether the words "frivolous," "just damages," and "an appeal" in Rule 38 are so lacking in meaning or articulated standards as to be void for vagueness under the Due Process Clause?

2. Whether due process of law requires notice and a hearing before substantial monetary sanctions and harsh public censure can be imposed under Rule 38?

3. If this Court decides that an order of sanctions against a lawyer is invalid, whether that holding would logically relieve the client of joint and several liability under the same invalid order?

4. Whether the Cross-Petitioner is precluded from raising a question of interpretation under Rule 38 that it failed to raise and preserve in the court below?

REASONS FOR GRANTING THE CROSS-PETITION IN PART AND DENYING IT IN PART

I. FOR THE REASONS STATED IN THE ORIGINAL PETITION AND INCORPORATED BY REFERENCE IN THE CROSS-PETITION, (1) RULE 38 IS UNCONSTITUTIONALLY VAGUE AND (2) DUE PROCESS REQUIRES NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE SANCTIONS CAN BE IMPOSED.

II. BECAUSE A DECISION HOLDING THE SANCTIONS ORDER INVALID WOULD NECESSARILY RELIEVE THE CROSS-PETITIONER OF ITS JOINT AND SEVERAL LIABILITY UNDER THE SAME INVALID ORDER, IT IS UNNECESSARY TO GRANT A WRIT OF CERTIORARI ON THIS ISSUE.

III. A WRIT OF CERTIORARI SHOULD BE DENIED ON THE ISSUE OF WHETHER RULE 38 PERMITS A COURT OF APPEALS TO AWARD SANCTIONS AGAINST THE CLIENT AS WELL AS AGAINST THE LAWYER, BECAUSE THE CROSS-PETITIONER FAILED TO RAISE AND PRESERVE THIS ISSUE IN THE COURT BELOW.

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COUNTERSTATEMENT OF THE CASE

Petitioner Owen E. Perry is a lawyer who was held jointly and severally liable with Cross-Petitioner Pac-Tec (his former client) for $134,000 in sanctions under Rule 38.

Among other issues that Perry has raised in his Petition are (1) that his appeal in the court below was arguable and therefore not in fact "frivolous," and (2) that sanctions should not be imposed in any event or, at least, should be mitigated, because of his good faith belief that his appeal was not "frivolous."

In factual support of those arguments, Perry stated in a Declaration (par. 16):

> Prior to the hearing on this appeal, Pac-Tec submitted the brief to another patent law firm for review. The opinion of that firm, as reported to me by Pac-Tec, was that *the other firm regarded Pac-Tec's chances of success on the appeal as 50-50.* Pac-Tec did not report to me that the other firm considered the appeal, as to any issue, to be frivolous. [Emphasis added]

This Declaration was included as Appendix I to Perry's Petition for a Writ of Certiorari, No. 90-1407, A49, and was referred to in the Petition itself at pages 4 and 11.

In its Cross-Petition, Pac-Tec implied that Perry's Declaration was false. Cross-Pet. at 6-7. Pac-Tec said:

> Contrary to the assertions of Perry in his Declaration, which was relied on in the petition for certiorari, the independent counsel deemed that Perry had "not made sufficient showing of error to obtain a reversal."

In support of this misleading contradiction of Perry's truthful Declaration, Pac-Tec cited a letter from Thomas E. Anderson to

Haig Avedisian (both of whom are now representing Pac-Tec in this Court).[1] However, Anderson has since admitted that:

(1) Anderson's letter was written not when his opinion was first given orally to Pac-Tec and transmitted orally to Perry, but was in fact written on the same day the appeal was argued by Perry in the Federal Circuit;[2]

(2) Perry never saw Anderson's letter until the Cross-Petition was filed;[3]

(3) Anderson had previously told Avedisian orally that "the appeal had a 50-50 chance *at best*" (his italics);[4]

(4) Anderson never opined that any aspect of Perry's appeal on behalf of Pac-Tec was frivolous;[5]

(5) Anderson is "uncertain" as to "exactly" how his present co-counsel Avedisian characterized Anderson's opinion to Pac-Tec;[6]

(6) Anderson is "not clear" as to "exactly" what Peter Hedgewick or Doug Forrer (principals in Pac-Tec and therefore his present clients) may have told Owen Perry;[7]

---

[1] The footnote citation to this letter in Pac-Tec's Cross-Petition is inaccurate. Footnote 10 on page 7 of the Cross-Petition should read "App. D, A8, *infra*."

[2] App E-A10,12. Anderson says that he was unaware of the coincidence of the dates at the time the letter was written. App E-A12.

[3] App E-A12.

[4] App E-A10.

[5] App E-A11.

[6] App E-A10.

[7] App E-A10.

(7) Therefore, "it may be" that Perry's Declaration accurately recounts what his client's officers told Perry;[8] and, finally,

(8) Anderson is "prepared to file a statement to the effect that Perry may have been told by representatives of Pac-Tec that *the chances of success were 50/50.*"[9]

In addition to these reluctant but conclusive admissions by Anderson of the misleading nature of what was said in the Cross-Petition, the Court's attention is invited to App. A-D, *infra*. In particular, none of the statements of fact in the letter from Perry's counsel to Avedisian (App. D) has been denied by Avedisian or by any of the principals of Pac-Tec.

* * * * *

Ordinarily, the kind of extra-record factual dispute that has occurred in this case might weigh against this Court's granting a Petition for a Writ of Certiorari.[10] In the present case, however, the extra-record dispute has been caused by the very error in the court below that Petitioner is seeking to have corrected.

If the Federal Circuit had afforded Perry the hearing that he requested, this factual dispute would have been raised and resolved in the court below and would not have been raised for the first time in this Court.

Pac-Tec's unsuccessful effort to make Perry's Declaration appear to have been false through the introduction of extra-record

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[8] App E-A11.

[9] App E-A11. (emphasis added). Perry has specifically asked, in a letter from his counsel to Avedisian, that this be done. App D-A8. As of the preparation of this Opposition, no such statement has been filed.

[10] Petitioner Perry's original Declaration is in the record below. However, the letter from Anderson to Avedisian that Pac-Tec included in the Appendix to its Cross-Petition, and which it used to give the misleading impression that Perry's Declaration was false, is not in the record below. Also outside the record are the letter from Safford to Avedisian, the second Declaration by Perry, and the Declarations of Safford and Snyder, all of which appear in the Appendix to this Opposition.

matter in its Cross-Petition, therefore, underscores how important it is that this Court make it clear that sanctions should not be imposed under Rule 38 without affording the parties notice and an opportunity to be heard at the circuit court level.

SUMMARY OF ARGUMENT

The Cross-Petition for a Writ of Certiorari should be granted in part and denied in part.

The Cross-Petition should be granted on the issue of whether F.R.App.P. 38 is unconstitutionally vague. On this issue, the Cross-Petition adopts by reference the arguments made in the original Petition in this case. Rule 38 does not define the critical words "frivolous," "an appeal," and "just damages." Moreover, the courts have been unable to give any consistent, coherent meanings to these words, and lawyers have been left to guess as to where proper, zealous advocacy leaves off and a frivolous appeal begins.

Since the issue of unconstitutional vagueness can be avoided by strictly construing Rule 38, however, the Court should also grant Petitioner's request that a writ be issued to decide the proper construction of the rule. First, "frivolous" should not be read to penalize an argument that is arguable on the merits. Second, "frivolous" should not be read to penalize an argument that is made in good faith. Third, at the very least, good faith should be considered by way of mitigation in determining what damages are "just." Fourth, "an appeal" should be read to refer to the entire appeal and not to some unquantified portion of it.

The Cross-Petition should also be granted on the issue of whether due process requires notice and an opportunity to be heard before penalties are assessed under Rule 38. On this issue, too, the Cross-Petition adopts by reference the arguments in the Petition.

Since the procedural due process issue can be avoided by a plain meaning reading of Rule 46(c), however, the Court should also grant Petitioner's request that a writ be issued to decide the interrelationship of Rule 38 and 46(c). Rule 38 provides for damages for filing a frivolous appeal. In addition to assessing damages of $134,000, the court below went beyond Rule 38 in publicly censuring Petitioner for alleged misconduct going beyond filing a frivolous appeal. Rule 46(c) requires notice and an

opportunity to be heard in any case of "conduct unbecoming a member of the bar" or of "failure to comply with these rules or any rule of the court." Thus, notice and hearing were required under the plain meaning of Rule 46(c).

The Cross-Petition should be denied on the issue of whether the Cross-Petitioner would remain jointly and severally liable under the Rule 38 order if that order were declared invalid by this Court. This conclusion follows as a matter of logic and common sense and does not warrant the time of this Court.

The Cross-Petition should also be denied on the Cross-Petitioner's contention that a client can never be found jointly and severally liable under Rule 38. The Cross-Petitioner failed to raise and preserve this issue in the court below.

REASONS FOR GRANTING THE CROSS-PETITION IN PART AND DENYING IT IN PART

I. FOR THE REASONS STATED IN THE ORIGINAL PETITION AND INCORPORATED BY REFERENCE IN THE CROSS-PETITION, (1) RULE 38 IS UNCONSTITUTIONALLY VAGUE AND (2) DUE PROCESS REQUIRES NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE SANCTIONS CAN BE IMPOSED.

The original Petition for a Writ of Certiorari in this case (No. 90-1407) has shown that F.R.App.P. 38 is unconstitutionally vague. Petition at 27-28. The Cross-Petition has incorporated this argument by reference. Cross-Petition at 15. The Petition and Cross-Petition should be granted on this issue.

Rule 38 does not define the critical words "frivolous," "an appeal," and "just damages." Moreover, the courts have been unable to give any consistent, coherent meanings to these words, and lawyers have been left to guess as to where proper, zealous advocacy leaves off and a frivolous appeal begins.

The original Petition also points out, however, that the issue of unconstitutional vagueness can be avoided by strict construction of Rule 38. First, "frivolous" should not be read to penalize an argument that is arguable on the merits. Petition at 10-14. Second, "frivolous" should not be read to penalize an argument that is made in good faith. Petition at 15-17. Third, at the very least, good faith should be considered in mitigation in determining what damages are "just." Petition at 17. Fourth, "an appeal" should be read to refer to the entire appeal and not to some unquantified portion of it. Petition at 17-19.

The original Petition has also shown that due process requires notice and an opportunity to be heard before sanctions can be applied under Rule 38. Petition at 19-22, 24-26. The Cross-Petition has also incorporated this argument by reference. Cross-Petition at 14. The Petition and Cross-Petition should be granted on this issue.

The Petition also points out, however, that the procedural due process issue can be avoided by recognizing that Rule 46(c) requires notice and an opportunity to be heard before sanctions can be imposed under Rule 38. Petition at 22-24. Rule 38 provides for damages for filing a frivolous appeal. In addition to assessing damages of $134,000, the court below went beyond Rule 38 in publicly censuring Petitioner for alleged misconduct going beyond filing a frivolous appeal, including "deceit." Rule 46(c) requires notice and an opportunity to be heard in any case of "conduct unbecoming a member of the bar" or of "failure to comply with these rules or any rule of the court." Thus, notice and hearing were required under the plain meaning of Rule 46(c), which avoids the need to decide the issue of constitutional due process.

In addition to granting the Petition and the Cross-Petition to review the constitutional issues raised in this case, therefore, the Court should also grant the Petition to review the important issues of interpreting the relevant rules, which could preclude the necessity for reaching the constitutional issues. *In re Snyder*, 472 U.S. 634, 642, 105 S.Ct. 2874, 2880 (1985).

II. BECAUSE A DECISION HOLDING THE SANCTIONS ORDER INVALID WOULD NECESSARILY RELIEVE THE CROSS-PETITIONER CLIENT OF ITS JOINT AND SEVERAL LIABILITY UNDER THE SAME INVALID ORDER, IT IS UNNECESSARY TO GRANT A WRIT OF CERTIORARI ON THIS ISSUE.

The Petitioner (a lawyer) and the Cross-Petitioner (his former client) have been found jointly and severally liable for $134,000 under the Rule 38 order of the court below. The original Petition has shown that the Rule 38 order is invalid because it has been issued in violation of the Constitution and the Federal Rules of Appellate Procedure. Petition at 19-26.

Cross-Petitioner appears to seek a Writ of Certiorari in part on the issue of whether it would continue to be liable under the order of the court below even if that order were declared invalid

by this Court. As a matter of logic and common sense, the Cross-Petitioner would not be liable for damages under an order that this Court held to be invalid. Accordingly, this issue does not appear to warrant the attention of this Court, and the Cross-Petition should be denied on this issue.

III. A WRIT OF CERTIORARI SHOULD BE DENIED ON THE ISSUE OF WHETHER RULE 38 PERMITS A COURT OF APPEALS TO AWARD SANCTIONS AGAINST THE CLIENT AS WELL AS AGAINST THE LAWYER, BECAUSE THE CROSS-PETITIONER FAILED TO RAISE AND PRESERVE THIS ISSUE IN THE COURT BELOW.

The Cross-Petition raises the issue in this Court — which it failed to raise in the court below — that Rule 38 should be construed to preclude any award of damages against a client.[11]

The Cross-Petitioner is effectively raising this issue simultaneously in state court by suing its former attorney (Petitioner) in malpractice, seeking reimbursement for any loss it might suffer through its joint and several liability under the Rule 38 order. *Pac-Tec v. Reising, Ethington, Barnard, Perry & Milton*, Cir. Ct., Cty. of Oakland, Michigan, No. 91-408911. In that forum, an

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[11] Pac-Tec's Objections to Amerace's Application For Fees, pages 8-10, filed in the Federal Circuit June 12, 1990. Although Cross-Petitioner referred to its reliance on the advice of counsel, it summed up its argument in the Federal Circuit by saying: "Thus, Pac-Tec requests this Court to reduce the attorney's fees to one quarter of that requested and reduce the expenses by eliminating the amounts set forth above in the amount of $16,008.55." (Objections at p. 9) Under "CONCLUSION" Cross-Petitioner asked only that the Federal Circuit "award Amerace reasonable attorney's fees and double costs as set forth above." (Objections at p. 10) Thus, Cross-Petitioner asked only that the court below reduce the amount of its joint and several liability, and nowhere made the argument that it now raises for the first time — that in light of what it claims to be the "goals" and "purposes" of Rule 38, it cannot be held jointly and severally liable under that rule.

appropriate factual determination can be made as to the comparative fault of the parties, if any.[12]

Cross-Petitioner acknowledges its failure to raise the issue in the Federal Circuit and attempts to justify this omission by stating that it was "unable" to address the issue because the court seemed "ill disposed to any application for reconsideration." Cross-Petition at 13. At that time, Cross-Petitioner had discharged Petitioner as its attorney and was being represented by the same attorneys who now represent it in this Court. Petition, App. H.

Cross-Petitioner's inference of a court's "ill disposition" is hardly an excuse for failing to take the elementary step of preserving an issue for appeal.[13] The fact that Petitioner was able to make an appropriate record in this very case is convincing demonstration of the flimsiness of Cross-Petitioner's excuse for having failed to do the same.

Like Cross-Petitioner here, the Government in *Demarest v. Manspeaker*, __ U.S. __, 111 S. Ct. 599 (1991), attempted to raise an issue of statutory interpretation without having preserved it below. In a unanimous opinion by Chief Justice Rehnquist, this Court held: "The Government did not raise this question in the courts below, and we decline to consider it here for the first time." 111 S.Ct. at 603.

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[12] The state litigation underscores the continuing harm to Perry that is being caused by the Federal Circuit's harsh censure of Perry in its Rule 38 Order. The complaint in that litigation characterizes the Federal Circuit's condemnation of Perry as "the most vitriolic commentary" and supports the malpractice claim with direct quotes from it. App A-A2 .

[13] In the words of Chief Justice Roger J. Traynor, in fulfilling his "duty to protect the interests of his client" it is the lawyer's "right to press legitimate argument and to protest an erroneous ruling." *Gallagher v. Municipal Court*, 31 Cal.2d 784, 192 P.2d 905, 913 (1948). See also *In re McConnell*, 370 U.S. 230, 236, 82 S.Ct. 1288, 1292 (1962) (It is "essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases.").

Accordingly, the Cross-Petition should be denied with respect to the contention that a client should never be held jointly and severally liable for damages under Rule 38.

CONCLUSION

For these reasons,

(1) The Petition and the Cross-Petition should be granted with respect to whether Rule 38 is unconstitutionally vague and should be granted with respect to whether due process requires notice and an opportunity to be heard before sanctions are imposed under Rule 38;

(2) The Petition should be granted with respect to whether Rule 38 should be strictly construed to eliminate its vagueness and should be granted with respect to whether Rule 46(c) requires notice and an opportunity to be heard before sanctions can be imposed under Rule 38; and

(3) The Cross-Petition should be denied with respect to whether Cross-Petitioner would be liable under an invalid order and should be denied with respect to whether damages against a client are precluded under Rule 38.

Respectfully submitted,

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(718) 507-2728

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Bloomfield Hills, MI 48304
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* Counsel of Record

Appendix A

DECLARATION OF OWEN E. PERRY

Owen E. Perry makes the following declaration under the penalties of perjury:

1. I have been a member of the District of Columbia and Michigan bars since 1959 and 1964, respectively. I am admitted to practice in the Eastern District of Michigan, the Fifth, Sixth, Eleventh, District of Columbia and Federal Circuit Courts of Appeal, the Supreme Court of the United States, and the United States Patent and Trademark Office.

2. Until May 10, 1990, I represented Pac-Tec, Inc. in *Pac-Tec v. Amerace Corporation.*

3. On at least two occasions while Pac-Tec's appeal to the Federal Circuit was pending, Pac-Tec informed me that Mr. Thomas E. Anderson, Pac-Tec's current patent counsel, had reviewed the matter and advised Pac-Tec that its chances for success on appeal were 50/50. One such occasion was at a meeting in my office in late 1989. Those present included Peter Hedgewick, Douglas Forrer and Haig Avedisian, Pac-Tec's general counsel. Messrs. Hedgewick, Forrer and Avedisian were directors of Pac-Tec. Another occasion was during a later meeting with Mr. Hedgewick at my office after Pac-Tec's Reply Brief was filed on January 10, 1990 and before the oral argument on March 5, 1990. We discussed the briefs and other matters unrelated to the appeal. Mr. Hedgewick repeated to me that Mr. Anderson had advised that Pac-Tec's chances on appeal were 50/50.

4. I deny that I ever advised Pac-Tec that it would "certainly succeed in obtaining a reversal by the Federal Circuit" as represented in the Cross Petition at p. 5. I did provide the advice noted in my January 15, 1990 letter to Pac-Tec's auditors (Appendix E to the Cross Petition), but I also explicitly told Pac-Tec that I could not guarantee a favorable result.

5. I never advised Pac-Tec against attempting to negotiate settlement. I explicitly encouraged an attempt at settlement, but expressed pessimism because of Amerace's previous demands for settlement terms that had consistently been unacceptable to Pac-Tec.

6. *Pac-Tec v. Amerace* was the first case argued in the morning session of the Federal Circuit on March 5, 1990. The argument concluded by approximately 11:00 a.m. Mr. Forrer and another Pac-Tec representative were present.

7. I note that Mr. Anderson's letter (App. D to Pac-Tec's Cross Petition) is dated March 5, 1990, the same date as the oral argument in the Federal Circuit. I was unaware of that letter until I received a copy of the Cross Petition.

8. On April 23, 1991 Pac-Tec filed a legal malpractice complaint against me and my firm in the Oakland County (Michigan) Circuit Court, Case No. 91-408911. The complaint characterizes the Federal Circuit's condemnation of me as "the most vitriolic commentary" and supports the malpractice claim with direct quotes from it.

/s/
Owen E. Perry

Date: April 29, 1990

Appendix B

DECLARATION OF RALPH R. SAFFORD

Ralph R. Safford makes the following declaration under the penalties of perjury:

1. I have been a member of the State Bar of Michigan since 1974 and am admitted to practice in the Eastern and Western Districts of Michigan, the Sixth Circuit Court of Appeals and the Supreme Court of the United States.

2. I am, and have since June 7, 1990, been acting as, counsel for Owen E. Perry in connection with *Pac-Tec, Inc.* v. *Amerace Corporation*.

2. I supervised the preparation of the Declaration of Owen E. Perry ("Perry Declaration") filed in the Federal Circuit on June 27, 1990 in support of Mr. Perry's Motion for Leave to Intervene and for Other Relief. A copy of the Perry Declaration was submitted as Appendix I to Mr. Perry's Petition for Writ of Certiorari.

3. Paragraph 16 of the Perry Declaration states as follows:

> Prior to the hearing on this appeal, Pac-Tec submitted the brief to another patent law firm for review. The opinion of that firm, as reported to me by Pac-Tec, was that the other firm regarded Pac-Tec's chances of success on the appeal as 50-50. Pac-Tec did not report to me that the other firm considered the appeal, as to any issue, to be frivolous.

4. These statements were based upon Mr. Perry's statement to me that on at least two separate occasions Pac-Tec had informed Mr. Perry that Pac-Tec had retained Thomas E. Anderson (Pac-Tec's present patent counsel) to review the briefs filed in the appeal and provide a "second opinion" on the likelihood that the appeal would be successful. Mr. Perry stated that on both occasions he was informed that Mr. Anderson regarded the chances of success of the appeal as 50/50. Mr. Perry also told me that he had not been informed by anyone that Mr. Anderson believed the appeal to be frivolous.

5. At two separate meetings, the first prior to the filing of the Perry Declaration in the Federal Circuit and the second prior to filing the Petition for Writ of Certiorari, Haig Avedisian, general counsel for Pac-Tec, Inc., confirmed to me that Mr. Anderson had been retained for a second opinion and had told Mr. Avedisian that he regarded the chances of success of the appeal as 50/50.

6. On another, separate, occasion prior to the filing of the Petition for Writ of Certiorari, Mr. Anderson confirmed to me in a telephone conversation that he had made the statement attributed to him by Mr. Avedisian.

7. After reviewing Pac-Tec's Cross Petition for Writ of Certiorari, I wrote a letter to Mr. Avedisian on April 12, 1991, a copy of which is included in Mr. Perry's Brief in Opposition to Pac-Tec's Cross-Petition for Writ of Certiorari as Appendix D. Mr. Avedisian has not denied any of the facts stated in my letter. On April 22, 1991 I received a letter from Mr. Anderson, a copy of which is included in the Brief in Opposition as Appendix E.

/s/

Ralph R. Safford

Dated: April 29, 1991

Appendix C

DECLARATION OF GEORGE E. SNYDER

George E. Snyder makes the following declaration under the penalties of perjury:

1. I have been a member of the State Bar of Michigan since 1961 and am admitted to practice in the Eastern and Western Districts of Michigan and the Sixth Circuit Court of Appeals.

2. I am a partner in the firm of Meyer, Kirk, Snyder & Safford, and I attended a meeting in Haig Avedisian's office with my partner, Ralph Safford, on January 31, 1991.

3. At this meeting, Mr. Avedisian described a Pac-Tec board of directors meeting which was held while the appeal in *Pac-Tec* v *Amerace* was pending (and before oral argument) during which the three Pac-Tec directors considered whether to continue or abandon the appeal. Mr. Avedisian reported that another patent lawyer, Thomas Anderson, had been asked for a second opinion. Mr. Avedisian stated to us that Mr. Anderson had evaluated the likelihood of success on appeal as 50/50. Mr. Avedisian told us that he remarked at the meeting he did not like 50/50 chances and tried to convince the other two directors to abandon the appeal.

/s/

George E. Snyder

Dated: April 29, 1991

Appendix D

[LETTERHEAD OF MEYER, KIRK, SNYDER & SAFFORD]

April 12, 1991

VIA MESSENGER

Mr. Haig Avedisian
401 South Woodward
Suite 450
Birmingham, MI 48009

Dear Haig:

This will confirm our telephone conversation of yesterday.

I called to inform you that we were surprised and appalled by certain misstatements of fact contained in the Cross-Petition for Writ of Certiorari which you and Tom Anderson filed on behalf of Pac-Tec. I told you that, in addition to the seriousness of the factual misstatements themselves, the creation of a factual dispute between Owen Perry and his former client in the Supreme Court on matters not of record could seriously jeopardize whatever chance we might have that our petitions receive favorable consideration by the Court.

I told you I would write you immediately to outline the misstatements, the first and most serious of which I mentioned in our telephone discussion:

1. Pages 6-7 of the Cross-Petition contains the following assertion:

> "Contrary to the assertions of Perry in his Declaration, which was relied on in the petition for certiorari, the independent counsel deemed that Perry had 'not made sufficient showing of error to obtain a reversal' ".

This statement falsely implies that no one told Owen about Tom Anderson's assessment that the chances of success on appeal were 50-50. It also falsely implies that Owen had prior knowledge

of Tom's March 5, 1990 letter, and that Owen came up with the 50-50 evaluation himself by interpreting Tom's letter.

As you know, and as you acknowledged again yesterday, you told me, on two earlier occasions, that Tom made the statement described in Owen's Declaration. As you probably also know, Peter Hedgewick told Owen on at least two occasions that Tom believed the chances of winning the appeal were 50-50. Tom has acknowledged to me he had so informed Pac-Tec.

2. As you also must know, Owen had never seen Tom's March 5, 1990 letter (nor had we) prior to its having been attached to your Gross-Petition. To imply otherwise, as you have done, seriously misleads the Court and does an unjustified disservice to both Owen and his current counsel.

3. It is also incorrect to state that "Pac-Tec became aware for the first time of the Federal Circuit's view of its appeal and its counsel's conduct in the maintenance of the appeal when it received the Federal Circuit's Opinion dated May 9, 1990." Cross-Petition, p. 13. Doug Forrer attended the oral argument and was well aware of Judge Markey's attitude and comments.

4. It is misleading for you to attach the March 5, 1990 letter, implying that this is the only advice received from Tom on the appeal, and then to fail to point out to the Court that the oral argument was held the same day the letter was written. Surely you and Tom are not denying that the letter was written and sent after you heard from Doug Forrer about the oral argument.

5. It is a misstatement for you to cite the Perry Declaration for the proposition that Owen stated that "he would certainly succeed in obtaining a reversal by the Federal Circuit." Cross-Petition, p. 5. Such a statement appears nowhere in the Declaration, and cannot be fairly inferred from what is contained in it.

6. It is a misstatement for you to state "[a]s is evidenced from the record of the trial court proceedings and from the Federal Circuit record, Pac-Tec has been led and seduced into a litigation process which no conscionable and competent attorney

would have undertaken." Cross-Petition, p. 8. The record is devoid of any evidence on these issues, and you have cited none. The malpractice case, which you have said you will shortly be filing, will obviously deal with such claims, but it is highly improper to introduce these irrelevant, unsupported assertions in your cross-petition and to suggest that they are supported by the record.

7. You make other assertions of fact in the Cross-Petition which are not in the record:

a. "After the filing of the briefs in the appeal, Pac-Tec was concerned as to whether Perry's optimistic expectation of success were (sic) accurate." p.6

b. "Unfortunately, the appeal had proceeded to a point beyond which a settlement could be negotiated." p. 7 (This statement, in light of the pending settlement negotiations, is also incorrect.)

c. "Furthermore, Perry overcame any misgivings Pac-Tec may have had and Pac-Tec was persuaded by Perry not to withdraw the appeal." p. 7

d. "Pac-Tec is now struggling for its existence." p. 8

It is extremely important that the misstatements of fact be promptly corrected, and that the Court be specifically advised that Owen Perry's Declaration is not false. Rule 15.1 of the Supreme Court Rules requires us to advise the Court of any misstatements of fact contained in the Cross Petition. We will do so if we must, but as I told you I wanted first to give you the opportunity to correct the misstatements of fact and the unsupported factual assertions yourself.

It is also important that Ron Sandler be promptly advised of this so that he does not use this apparent factual dispute as a basis for opposing either petition.

Because of the seriousness of this matter, and the deadline for our opposition brief, may I please hear from you as soon as possible.

Yours very truly,

/s/ RALPH R. SAFFORD

RRS:bfb

cc: Monroe H. Freedman
Owen E. Perry

Appendix E

[LETTERHEAD OF GIFFORD, GROH, SPRINKLE, PATMORE & ANDERSON, P.C.]

April 22, 1991
Our File: PTH-150/8

VIA FACSIMILE

Ralph R. Safford
Meyer, Kirk, Snyder & Safford
100 W. Long Lake Rd.
Suite 100
Bloomfield Hills, MI 48010

Re: Pac-Tec, Inc. v. Owen E. Perry et al
No. 90-1525

Dear Ralph:

This letter is written in response to your letter of April 12, 1991 to Haig Avedisian. My opinion of the Appeal Brief was first given orally to Haig Avedisian. Haig recalls that I told him that the appeal had a 50/50 chance *at best* and that I gave several grounds for a likely denial of the appeal. I do not recall discussing percentages during my conversation with Haig prior to the written opinion. I do recall specific criticisms which were made of the brief and delivering those criticisms to Haig.

I did not have any direct contact with anyone at Pac-Tec other than Haig Avedisian prior to the Federal Circuit's Opinion dated May 9, 1990. I was not present at any conversations which Haig had with Pac-Tec, so I am uncertain as to exactly what his characterization of my opinion was to Pac-Tec. Further, I am not clear on exactly what Peter Hedgewick or Doug Forrer may have told Owen Perry.

Nevertheless, we do not deny in our brief that Perry may have been told by Pac-Tec that my opinion was that the chance of success on appeal was 50/50. The point made in the brief is that my opinion of the chances of success was that Perry had "not made sufficient showing of error to obtain reversal".

It appears that the reason that my opinion is referred to in your brief is to bolster an argument that other attorneys did not consider the appeal frivolous. Although I did not venture an opinion as to whether the appeal was frivolous or not, I do recall orally telling Haig that Perry's brief was so difficult to comprehend that I was unable to understand the issues until I read the Appellee's Brief. Additionally, I informed Mr. Avedisian that there were some severe substance problems.

Since my opinion has been put at issue by Mr. Perry, we were entitled to clarify the nature of my opinion. In making the statement in his affidavit, Perry was relying on either Forrer or Hedgewick's restatement of Avedisian's characterization of my opinion. I do not know what Mr. Hedgewick told Mr. Perry. It is possible that Mr. Perry took Mr. Hedgewick's statement out of context, or it may be that Mr. Perry's statement is an accurate representation of what Mr. Hedgewick told Mr. Perry. However, the statement does not accurately reflect the nature of my opinion. Mr. Perry was relying on hearsay and as a result, he has placed himself in the position that he now finds himself with respect to this statement.

With respect to particular concerns raised by your letter, first, our statement does not falsely imply that "no person told Owen about Tom Anderson's assessment that chances of success on appeal were 50/50". That is merely the inference which you take from the statement. However, to the degree that such an inference is possible, we are prepared to file a statement to the effect that Perry may have been told by representatives of Pac-Tec that my opinion was that the chances of success were 50/50. We do not believe, however, that my opinion was that as represented by Perry's declaration. In making our clarification, we will

also indicate that Perry did not see the written opinion prior to the filing of our Cross-Petition.

With respect to points 3 and 4 of your letter, we are uncertain as to Doug Forrer's impression of what the argument was; however, as an attorney that has appeared before the Federal Circuit, I cannot say that anyone, including an attorney, can accurately judge the Court's opinion of an appeal at the time of oral argument. Further, I had no communication of any kind with Doug Forrer or Peter Hedgewick prior to May 10th. Further, I had no information regarding when the oral argument was being held or that Doug Forrer was in attendance prior to May 10, 1991. In fact, until your letter of April 12th, I did not even realize that the oral argument was held on the same date that my letter was written. Therefore, I categorically deny that my letter was written and sent out after having any information from Doug Forrer about the oral argument.

With respect to point 5 of your letter, it appears that we incorrectly cited the Perry declaration rather than the Perry opinion letter which was set forth as Appendix E of our Cross-Petition. We do not believe that there is any change in the substance of the brief, however, we will correct the citation in the footnote.

With respect to points 6 and 7, we concede that the record is not complete with respect to these points. The record is not complete because we have not had an opportunity to make a

record as far as these areas. In fact, we are seeking an opportunity, by our Cross-Petition, to have a forum in which we may make a record on these points. However, without apprising the Court of the possible record which could be made, it is impossible for us to set forth our position. Therefore, we do not feel it necessary to take any steps to alter or amend our petition with respect to these areas. Of course, you may file a response in opposition to our Cross-Petition and raise this as an issue.

Very truly yours,

/s/ THOMAS E. ANDERSON